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In the Supreme Court of the United States

OCTOBER TERM, 1957

ERNEST NELSON MURRAY AND CHARLOTTE AGNES MURRAY, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Court of Appeals (R. 3-7)[1] is reported at 250 F. 2d 489.

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[1] The record consists of 5 volumes. Volume I contains the indictment, judgment, minutes of the trial court, motions, etc. It is separately paginated and herein designated "Ind.". Volumes 2 and 3 contain the trial proceedings and are designated "T.". Volume 4 consists of a one page requested charge, on the issue of entrapment, denied by the trial judge. Volume 5 is the record of the proceedings in the Court of Appeals and is designated "R.".

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1957 (R. 8). A petition for rehearing was denied on February 24, 1958 (R. 9). On March 15, 1958, Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari to and including April 24, 1958, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of evidence relating to petitioners' post-conspiracy activities resulted in a fatal variance between the indictment and the proof, where the jury was charged that it might consider such evidence only to the extent that it shed light on what happened during the conspiracy.

2. Whether the trial judge committed reversible error by inadvertently reading to the jury as overt acts two transactions occurring after the conspiracy, despite the fact that he specifically forbade the jury from considering post-conspiracy transactions as overt acts and there was ample evidence to show the commission of overt acts within the period of the conspiracy.

STATEMENT

On March 15, 1956, a 5-count indictment was returned in the United States District Court for the Southern District of California charging that petitioners together with defendants Schrier and McCormick conspired with others, not named as defendants, to smuggle psittacine birds into the United States from Mexico, from December 1, 1955, until the date of the

return of the indictment (Count 1; Ind., pp. 1-4).[2] Count 2 charged all four with the smuggling of 42 birds into this country on or about February 1, 1956 (Ind., p. 5), and count 3 charged the receipt, concealment, and transportation of said birds on that date (Ind., p. 6).[3]

On September 10, 1956, defendant McCormick pleaded guilty to a lesser charge, and the charges against him under this indictment were dismissed (T. 170-171). Defendant Schrier pleaded guilty to each of the charges contained in counts 1-3 of the indictment (T. 171). Following a jury trial, petitioners were convicted on each of counts 1-3 (T. 273-275). Petitioner Ernest Murray was sentenced to imprisonment for two years on each of counts 2 and 3, to run concurrently; imposition of sentence was suspended on count 1 and he was placed on probation for 3 years, such probation to commence upon the expiration of the sentences imposed under counts 2 and 3 (Ind., pp. 27-28). Petitioner Charlotte Murray was placed on probation for 3 years on each of counts 1-3, to run concurrently (Ind., pp. 29-30). On appeal, the judgments were affirmed (R. 3-7).

The evidence adduced by the government may be summarized as follows:

1. Sometime in December 1955, Richard Schrier, who had previously smuggled psittacine birds into the United States from Mexico (T. 12-13), agreed to smug-

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[2] In his charge to the jury, the trial judge instructed that the conspiracy terminated on February 1, 1956. See *infra*, p. 7.

[3] Counts 4 and 5 which named only the petitioners and charged them with the smuggling, receipt, concealment and transportation of 17 birds on February 16, 1956, were withdrawn on the government's motion (T. 177).

gle some Panama parrots into this country for petitioner Ernest Murray (T. 12, 14). Schrier thereafter went to Mexico, purchased parrots, smuggled them into the United States and sold 8 of them to Murray (T. 14-15). He received $345 from Murray in payment for these birds (T. 15, 42). A few days after this sale, Murray, who ran an aviary in Whittier, California (T. 7), hired Schrier to smuggle birds on a regular basis (T. 8-10, 22-23). The understanding was that Schrier was to receive $150 per trip for hauling the birds from Tijuana, Mexico, to Murray's farm (T. 22). Pursuant to this agreement, Schrier made approximately 17 trips to Mexico for birds—7 of which proved successful (T. 24). Murray advised him as to the kind of birds to buy, mentioned a place where they would be available, and gave Shrier money to purchase the birds (T. 25-27). Shrier testified that, at Murray's request, he telephoned one Jesse Gonzales in Mexico and heard Murray tell him that Schrier was no longer working for himself, but for Murray; that Schrier would refuse to accept birds that were no good; and that Murray would send the money down with Schrier (T. 30-31).[4] Mrs. Schrier testified that in late December 1955, Murray came to her home and spoke to her husband about his going down to Mexico to pick up some birds (T. 135-136). She further testified that she accompanied her husband on 6 or 7 of his trips to buy birds for Murray (T. 137-140).

Sometime in January 1956, Schrier had a conversa-

[4] Gonzales testified that he met with Murray in Mexico in January, 1956, and that Murray arranged for the purchase of the birds and advised him they were to be picked up by Schrier (T. 118-123).

tion with petitioner Charlotte Murray, in which she told him not to pick birds that were sick (T. 32-33).[3]

On February 1, 1956, prior to leaving for Mexico on one of these trips, Schrier and McCormick (Schrier's father-in-law) conferred with Murray. He told them the birds he wanted and gave them $400 (T. 34-35). Schrier and McCormick then went to Mexico and purchased over 40 psittacine birds. They put the birds in the trunk of their car and smuggled them across the border. Thereafter, they ran into a roadblock of Customs agents who found the birds and placed Schrier and McCormick under arrest (T. 35-36). This arrest terminated the conspiracy charged in count 1. The smuggling and the receipt, concealment, and transportation of the birds on that date constituted the substantive offenses contained in counts 2 and 3. These were the only counts submitted to the jury.

2. Additional testimony was adduced concerning events subsequent to Schrier's arrest. Marian Glen Goodrich testified that some three days after his first meeting with Ernest Murray on February 3, 1956, he informed Murray that he had seen a roadblock of United States Customs agents between Oceanside and Long Beach, California. Murray told him that he had a man (Roy Lee) then in Mexicali who was bringing birds back and arranged for Goodrich and Murray's step-daughter to drive down to Mexico and inform Lee of the roadblock (T. 72-74). Goodrich testified that he went down to Mexico with Murray's step-

[3] Schrier admitted on cross-examination that much of what he had told Customs officials concerning Mrs. Murray was untrue. He stood by his story, however, that she told him what kind of birds to pick (T. 66-67).

daughter but could not find Lee (T. 74-75).[6] Upon informing Murray of this, he was advised that Lee had returned safely (T. 76).

When Goodrich expressed interest in working for Murray in the bird business (T. 76), Murray pointed out the method by which birds might be procured without running into a roadblock. As Murray explained it, Goodrich was to drive to Mexicali or Tijuana accompanied by another car which would wait on the American side of the border until Goodrich had obtained the birds. The two cars would then meet at a prearranged rendezvous. The "scout car" would then start back on the return trip, 10 minutes before Goodrich. If the driver of the "scout car" spotted a roadblock, he would double back over another route and warn Goodrich who would wait until the agents were off duty (6:30 a.m. to 7 a.m.) and then safely return with the birds (T. 77-78). Mrs. Murray participated in this conversation and told Goodrich (T. 78):

> We have been in this business 18 years. We have run this scout car out for all of that time. We used to run birds seven days a week and we never got caught once in 10 years.

Murray also told Goodrich to visit Schrier and tell him "to keep his mouth shut", and that Murray would attempt to get him out of jail "before he talks to the Customs Agents" (T. 79, 80). Goodrich thereafter went to the Customs authorities and under their supervision arranged to smuggle birds in for Murray. On February 16, 1956, he and Mrs. Schrier brought in a

[6] Murray's step-daughter denied having made such a trip with Goodrich (T. 201).

load of birds from Mexico which the Murrays picked up from Goodrich's car at Mrs. Schrier's house. Customs agents were waiting at the scene and arrested petitioners (T. 82-92, 104-110, 113-114; see also testimony of Shirley A. Schrier, T. 144-147, 153-154, 160-163).

3. The trial judge charged the jury (T. 244, 257):

> In thinking the matter over and going over this case, I think I will instruct you that the conspiracy in this case terminated as of February 1. Anything that happened after February 1 had nothing to do with the conspiracy unless it throws some light upon something that happened prior to February 1. So in the consideration of this case you can disregard the testimony of all the witnesses relative to what happened after February 1, unless what they said or did after February 1 threw some light on what happened prior to February 1.
>
> * * * * *
>
> You will remember I instructed you the conspiracy ended with February 1, and although the indictment says to the date of the return of the indictment, you are to consider the conspiracy relative only to the termination date of February 1.

ARGUMENT

Petitioners challenge only their conspiracy convictions[7] claiming (1) that there is a fatal variance between the indictment, which charged one conspiracy,

[7] Mrs. Murray was put on probation for 3 years on each of the three counts, to run concurrently. Her conviction is supportable therefore on any one of the counts. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640.

and the evidence at the trial, which adduced two and (2) that the trial judge committed prejudicial error in submitting for the jury's consideration overt acts occurring after the termination of the conspiracy. Both these arguments are baseless.

a. As we have shown in the Statement, there was more than sufficient evidence for the jury to conclude that from the middle of December, 1955, until February 1, 1956, petitioners conspired with Richard Schrier and others to smuggle psittacine birds into this country. No argument is advanced, nor could one be validly made, that such arrangement was anything but a single unlawful scheme. With respect to the events adduced at the trial occurring after Schrier's arrest—which petitioners contend related to a second independent conspiracy—the jury was carefully admonished to disregard such events, except where they might "throw some light on what happened prior to February 1" (T. 244, *supra*, p. 7).[8]

Certainly, it was proper for the jury to consider the events occurring after the conspiracy ended, if such events clarified or explained the nature and methods of the alleged criminal design, *Lutwak* v. *United States*, 344 U. S. 604, 617-619, or indicated "a consistent pattern of conduct * * *." *Nye & Nissen* v. *United States*, 336 U. S. 613, 618.[9] To argue that despite the limiting

[8] The trial judge further cautioned the jury that any admissions of guilt made by a co-conspirator after termination of the conspiracy could be considered only against the person making such an admission (T. 268).

[9] For example, Murray's detailed description of how to avoid a roadblock (T. 77-78) and Mrs. Murray's statement, in his presence, that they had "been in this business 18 years" and "never got caught once in 10 years" (T. 78), would have been relevant under the judge's charge even though occurring after February 1.

instructions the jury might have considered such events in an improper connection is to indulge in the kind of unfounded speculation concerning jury capacity rejected by this Court in *Delli Paoli* v. *United States*, 352 U. S. 232, 242-243, and *Opper* v. *United States*, 348 U. S. 84, 94-95.

b. At the close of its case, the government dismissed counts 4 and 5 which charged smuggling and illegal receipt, concealment, and transportation of psittacine birds on February 16, 1956 (T. 177), and at the conclusion of the trial, overt acts 4 and 7 (T. 225) which also related to post February 1 activity. Petitioners contend that overt acts 5 and 6 [10] should similarly have been stricken from the indictment, and argue that failure to strike these acts constituted reversible error since the jury may thus have predicated petitioners' guilt upon transactions occurring after the conspiracy was at an end.

Although the trial judge did not strike overt acts 5 and 6, this was obviously the result of inadvertence which could not have led the jury into the error asserted by petitioners. The trial judge carefully instructed the jury that the conspiracy terminated on February 1, 1956 (see Statement, *supra*, p. 7). Furthermore, after reading the indictment to the jury, he charged (T. 268):

> If you find from the evidence beyond a reasonable doubt that the conspiracy charged in the indictment has been proved, *and that during the existence of the conspiracy*, and within the five

[10] Overt act 5 charged that on February 12, 1956, petitioner Ernest Murray gave Goodrich and Mrs. Schrier checks totalling $400; overt act 6, that he gave them $210 in cash on February 15, 1956 (T. 259-260).

> year period immediately preceding the filing of the indictment in this case on July 27, 1955, *one of the overt acts alleged was knowingly done by one of the conspirators, the conspiracy offense charged is then complete* * * *. [Emphasis added.]

Hence, the jury would have completely disregarded its instructions if it had based petitioners' guilt on either overt acts 5 or 6. In the context of the entire charge, failure to delete such transactions from the indictment was no more than harmless oversight.[11]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[11] There was ample evidence from which the jury could have found the commission of any of overt acts 1-3—all occurring on or before February 1. For example, overt act 3 charged that Schrier and McCormick transported psittacine birds on or about January 30, 1956. Schrier testified to such transaction, and the evidence shows that these two co-conspirators were arrested on February 1, illegally possessed of the birds (*supra*, p. 5).

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